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ABSTRACT

Recent trends and developments regarding the practice of religion in public schools are discussed in this report. Topics included are prayer, display of religious symbols and materials, holiday observances, weekend activities, distribution and study of scriptural literature, "parochiaid," and religious discrimination. The author concludes that the Establishment Clause of the U. S. Constitution has been breached with increasing frequency because of a trend towards more conservative attitudes by the public at large who are not tolerant of minority views; the growth of the Christian evangelical movement and its entry into politics; and the apparent willingness of judges to relax previous interpretations of the tri-partite test to evaluate governmental activity challenged under the Establishment Clause. (JEH)

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ADL DOMESTIC REPORT

LAW

Church-State Separation: Recent Trends and Developments

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LAW

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Church-State Separation: Recent Trends and Developments

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

These words, part of the First Amendment to the United States Constitution, embody two distinct ideas, the Establishment Clause and the Free Exercise Clause. The latter grants the right to freely practice religion, while the former has been described as creating a "wall of separation" between church and state.

Problems in the Free Exercise area tend to revolve around the rights of those whose religion differs from that of the majority. These cases usually focus on issues such as the amount of accommodation an employer must make for an employee's religious beliefs, the ability of Sabbath observers to participate in various activities, and an employee's ability to receive unemployment compensation after leaving a job for religious reasons.

The Establishment Clause cases focus on governmental activity in the sphere of religion—activity breaching the idea of governmental neutrality towards religion. These cases focus on issues such as religious exercises in public schools, government assistance to sectarian schools and the display of religious symbols on public property. In this context, "governmental activity" means a state or federal law, a local ordinance, or an action by an arm of a governmental agency, such as the school board.

The U.S. Supreme Court has, over the years, devised a three prong test to evaluate governmental activity challenged under the Establishment Clause. To be constitutional, the activity must

1) have a secular purpose;
2) have a primary effect which neither advances or inhibits religion;
3) avoid excessive government entanglement with religion.

Governmental activity which runs afoul any one of these criteria is unconstitutional.

Since the publication of the last issue of Law, there have been many new developments in the church-state area. From our perspective, these developments have, for the most part, not been positive. The last few years have witnessed the convergence of several factors which have forced a breach in the previously described "wall of separation" between church and state. Among the most prominent are: (1) the trend toward a more conservative attitude by the public at large; (2) the growth of the Christian evangelical movement and its entry into politics; and (3) the apparent willingness of judges, including a majority of justices of the U.S. Supreme Court, to relax previous interpretations of the Court's tri-partite test. This issue of Law, while not being exhaustive, will describe the recent cases and analyze the trends in constitutional law which they reflect.

While there are numerous issues that fall under the heading of church-state separation, our analysis will focus on the following specific areas of concern:

I. Religious Practices in the Public Schools
II. Parochiaid
III. Religious Discrimination
IV. Display of Religious Symbols on Public Property

I. RELIGIOUS PRACTICES IN THE PUBLIC SCHOOLS

A. Prayer in the Public Schools

The recital of prayers in the public schools was declared unconstitutional by the U.S. Supreme Court in the 1962 case of *Engel v. Vitale*. In that case, the Court ruled that the recital of a so-called non-denominational prayer by children before the start of each school day violated the Establishment Clause of the First Amendment. The following year, in *Abington School District v. Schempp*, the Supreme Court struck down as unconstitutional a program in which passages from the Bible and the Lord's Prayer were read in public schools. In *Schempp*, the fact that attendance at these functions was not compulsory failed to legitimize them in the eyes of the Court, which felt that young children would not be able to withstand the subtle coercive pressure to attend.

Proponents of prayer in public schools have tried different approaches in their efforts to reinstitute school prayers. One such approach, the use of silent meditation provisions as a substitute for prayers, has spread rapidly in recent years. Under the provisions of most silent meditation statutes, students are asked by their teachers to sit quietly for a minute or two and just meditate or pray silently. Considered in the abstract, silent meditation involves nothing to which exception could be taken on constitutional grounds – it is in the implementation that problems arise.

1. *Gaines v. Anderson*

In *Gaines v. Anderson* (1976), a three-judge district court in Massachusetts upheld the constitutionality of a statute which required a minute of silence for "meditation or prayer" at the start of each school day. The court held that the statute had the requisite "secular purpose," explaining

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> "it is entirely consistent with the secular goals of public schools for the state to encourage students to turn their minds silently toward serious thoughts and values."

The court noted that meditation "is not necessarily a religious exercise," and that the statute permitted students to meditate *or* pray. However, seeing as the students were not compelled to do either, but could choose to sit quietly, the court held that the provision did not advance religion. Thus, the court held that the statute did not violate the Establishment Clause. The court also held that since the statute did not *require* student participation it did not infringe on the rights of the students under the Free Exercise Clause.

The American Civil Liberties Union, which sponsored the suit, decided not to appeal the decision after an examination of the record failed to disclose any evidence of abuse of the statute by the public schools or any of the teachers. In the years immediately following *Gaines*, similar laws were enacted in several other states. It is clear that this trend will continue until an appropriate case for review can be found and presented to the U.S. Supreme Court (i.e., a clear abuse of a silent meditation law by a particular school district).

In addition to the silent meditation approach, proponents of school prayers have recently taken steps to attempt to restore the oral recitation of prayers in public schools, in clear violation of the U.S. Supreme Court's mandate against school prayer.

2. *Kent v. Commissioner of Education*

In November 1979, the Massachusetts Legislature enacted a "voluntary" school prayer law which provided:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of prayer may be offered by a student volunteer, and during such period an excusal provision will be allowed for those students who do not wish to participate.

The law went into effect in February 1980, and was immediately challenged by the American Civil Liberties Union in *Kent v. Commissioner of Education*. When the parties to the lawsuit filed a motion that the case be heard by the entire Supreme Judicial Court instead of by a single judge, the motion was granted and within one week of hearing oral arguments the court ruled that the statute was unconstitutional.

The court applied the tri-partite test described above, and held, unlike *Gaines*, that the statute did indeed lack a secular purpose, since "prayer is necessarily religious." The court rejected the argument that a prayer with a secular purpose, i.e., the release of hostages, could be called secular or non-religious saying, "The question is not what a supplicant asks but to whom he addresses his supplication."

The court also held that the statute violated the second prong of the tri-partite test and had the primary effect of advancing religion in that it "lent no small degree of official recognition and sanction to the religious enterprise." As to the supposed "voluntariness" of such a religious exercise, the court noted that it was "hardly a robust or realistic conception when the choice is made by impressionable youngsters inclined to conformity..."

Finally, it rejected the argument that the statute was permissible under the Free Exercise clause, saying

> The constitutional answer is that it is not unreasonable to ask those parents and children to find accommodation for their religious practices outside the classrooms of public schools, for example, in the home.

There is a distinction between the silent meditation statute upheld in *Gaines* and the "voluntary" prayer statute struck down in *Kent* that might explain why the courts reached opposite conclusions. In *Gaines*, the statute set aside time for a period of "silence"—as there was no mandate that students meditate or pray, the court held that the legislature had maintained a "neutral" approach to religion. The statute in *Kent*, however, specifically set aside time for "prayer," which by its very definition is a religious activity.

While the pro-prayer forces were unsuccessful in Massachusetts, it must be noted that the legislation at issue in *Kent* has been introduced in several other state legislatures including Florida, Ohio, Kentucky, and Arizona. Should any of these bills become law, further litigation is sure to follow.

3. *The Helms Amendment*

While the statute in *Kent* was challenged in state court, similar suits are often brought in the federal courts. However, a proposal currently before the House Judiciary Committee would eliminate federal court jurisdiction over, and ultimately, Supreme Court review of, constitutional challenges to "voluntary" prayer in the public schools. The proposal, known as the Helms Amendment, is attached to a bill which would modify the Supreme Court's appellate jurisdiction. (The bill's other provisions are not involved in the controversy.)

The immediate result of the Helms Amendment would be to limit judicial review of "voluntary" school prayer laws to the state courts. The likely result would be that while some state courts might bar school prayer, others would permit the practice. This could conceivably result in fifty different views of what the Constitution permits. For this reason, the Department of Justice as well as many constitutional lawyers and religious leaders of all faiths oppose the Helms Amendment. The Department of Justice, in a June 1980 memorandum to Peter Rodino, Chairman of the House Judiciary Committee, termed the bill unconstitutional because it would impinge on the Supreme Court's role as the ultimate interpreter of the federal Constitution.

The Helms Amendment is thus a blatant attempt to circumvent the Supreme Court's ban on school prayer. Previous attempts to amend the Constitution were also made in the decade that followed the Supreme Court decisions in *Engel v. Vitale* and *Abington v. Schempp*. Soon after these decisions were announced, efforts were made to amend the Constitution to permit the voluntary recitation of prayers in public schools. Most of these attempts were made in a three to four year span immediately following the Supreme Court decisions. However, at Congressional hearings on the proposed amendments, religious leaders of all faiths and many constitutional lawyers who testified voiced strong opposition to such amendments.

In 1971, a discharge petition forced the House Judiciary Committee to place a school prayer constitutional amendment before the House of Representatives for a vote. However, the proposed amendment fell 29 votes short of the necessary two-thirds majority.

In a forerunner to the Helms Amendment, the Senate, in 1976, overwhelmingly rejected an amendment which would have removed all cases involving public schools, including school prayer cases, from the jurisdiction of the federal courts.

Their efforts to amend the U.S. Constitution having failed, the proponents of school prayer are attempting to circumvent the amendment process. If approved, the Helms Amendment would bar Supreme Court review of an entire constitutional issue – and for the first time, Congress will have told the Court that it cannot interpret a provision of the First Amendment. If enacted, the Helms Amendment would set a dangerous precedent for those who would attack other constitutionally guaranteed freedoms – it could give them a method of changing the Constitution without going through the required amendment process.

The Helms Amendment was approved by the Senate on April 9, 1979, by a vote of 51-40, and was sent to the House of Representatives. It was fully expected that the amendment would be killed in committee, as the entire House leadership was opposed to it. However, supporters collected signatures on a discharge petition, which would bypass the committee system and bring the bill directly to a vote on the House floor. A massive campaign by fundamentalist Christian groups favoring the amendment began in April, 1980, and the number of signatures on the discharge petition soared. (A total of 218 signatures of members of the House of Representatives was needed.) In response to the pressure being generated by the discharge petition, the House Judiciary Committee held hearings on the Helms Amendment in July, 1980, thus delaying a vote by the House, and putting the discharge petition "on hold."

B. Display of the Ten Commandments

Two states recently enacted laws requiring that the Ten Commandments be displayed in public school classrooms. While the statutes were similar, constitutional challenges in each state produced startlingly different results.

North Dakota enacted a provision which required the posting of "the ten commandments of the Christian religion...in a conspicuous place in every schoolroom." In January, 1980, the U.S. District Court for the District of North Dakota held that the statute was unconstitutional and enjoined its enforcement.

The suit, *Ring v. Grand Forks School District*, was brought by a group of schoolchildren and their parents, who claimed that the statute violated both the Establishment and Free Exercise Clauses of the First Amendment. The court held that the statute's purpose was clearly sectarian, as its intent was the prominent display of the Ten Commandments of the Christian faith, and as the statute specified the Christian faith, it served to advance religion. The court did not consider whether there was a violation of the Free Exercise Clause. It should be noted that the Ten Commandments of the Christian faith are not identical to those of the Jewish faith.

Kentucky was the second state to enact a statute requiring the display of the Ten Commandments in public classrooms. However, when parents, schoolchildren and taxpayers challenged the law, the Kentucky Supreme Court, by virtue of a 3-3 vote, let stand a lower court's decision that it was constitutional.

The statute challenged in *Stone v. Graham* (1980) required that a permanent copy of Ten Commandments be displayed in every classroom. The copies were to be purchased with private contributions made for that purpose. In addition, each copy was to bear the following statement in small print following the last commandment: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

The challenge to the statute was based on both the Establishment and Free Exercise Clauses of the First Amendment. However, the trial court upheld the statute, saying that there is "no good reason why all or any part of the Bible may not be used for other than religious purposes, for secular purposes, for historical and literary purposes." The trial court's holding was appealed to the Kentucky Supreme Court, which in a 3-3 vote, let the lower court's decision stand. (One judge had disqualified himself.) Three members of the court would have held that the statute violated both the United States and Kentucky Constitutions, while the other three judges would have held that the statute had a secular purpose and was thus legally permissible. The plaintiffs plan to seek Supreme Court review of the decision.

C. Holiday Observances in the Public Schools

In April, 1980, the U.S. Court of Appeals for the Eighth Circuit upheld a 1978 school board policy which permitted the singing of Christmas

carol: performance of religious plays and displays of religious symbols in the Sioux Falls public schools. The lawsuit, *Florey v. Sioux Falls School District*, had been filed on behalf of six plaintiffs, including a six-year old pupil, to prevent the further implementation of the challenged policy.

Following a parent's complaint about the religious nature of a 1977 kindergarten Christmas program, the school board established a citizen's committee to develop guidelines, which permitted "1) observance of holidays with both a religious and secular basis; 2) use of music, art, literature and drama with religious themes and basis, if presented in a prudent and objective manner; and 3) the use of religious symbols as a teaching aid if such symbols were displayed as an example of the cultural and religious heritage of the holiday and were temporary in nature." The plaintiffs claimed that this policy authorized sectarian practices in the public schools, and violated the Establishment Clause of the First Amendment.

The U.S. District Court for the Southern District of South Dakota held that the policy was constitutional, pointing out that while many artistic traditions were religious in origin, they have subsequently become integrated into our national culture and heritage. The U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's holding by a vote of 2-1. The majority described the policy as an attempt to delineate the scope of permissible activities, and noted that teachers had the option of including the material in their lessons, but were not required to do so. The court felt that the guidelines did not violate the Establishment Clause, as the policy had the secular purpose of "advancement of the students' knowledge of society's cultural and religious heritage." Additionally, the court said that the policy had the primary effect of advancing "a secular program of education, and not of religion." The majority held that the policy did not constitute excessive government entanglement with religion; to the contrary, the court described the rules as providing "the means to ensure that the district steers clear of religious exercises." The court also said that since students could be excused from participating in activities that offended their religious beliefs, there was no violation of the Free Exercise Clause.

The dissent argued that the policy guidelines were unconstitutional as they sought to accomplish a secular goal (a knowledge of various cultural and religious heritages) via religious means (the observance of certain Christian religious holidays). Also, it was noted that by having Christmas assemblies featuring traditional Christmas music during the Christmas season, "the school district has in effect endorsed the beliefs of one religion." The dissent took the position that as the rules allowed the school district to decide if a given activity was religious, there was an excessive government entanglement with religion. While the dissent did not consider a challenge based on the Free Exercise Clause, it noted that the excusal provision did not by itself refute a valid Free Exercise challenge to the rules.

The plaintiffs plan to seek Supreme Court review of the decision.

The opinion in *Florey*, like the decision in *Stone v. Graham*, is difficult to square with the Supreme Court's tri-partite test. While these lower courts purport to apply the Supreme Court's standards, they have, in fact, undermined them in application in an apparent attempt to accomodate perceived community desires.

D. Saturday Graduation Exercises

In May 1980, the Virginia Supreme Court in *Stein v. Fairfax County School Board* upheld a school board's decision to hold a high school graduation ceremony on Saturday morning. The board's decision had been challenged by twin sisters, observant Jews, who were among those students selected to speak at the ceremony.

The Steins originally challenged the Saturday graduation in administrative channels for several months. While acknowledging that the scheduling had been done solely for "administrative convenience," the principal refused to alter the date. His decision was upheld by various school officials, who noted that "there is currently no prohibition against holding student activities on weekends."

On March 28, 1980, the Steins filed suit in Fairfax County Circuit Court, seeking an order rescheduling the graduation so as not to conflict with the Jewish Sabbath. They claimed that the Saturday graduation violated their rights under the Free Exercise Clause of the First Amendment. Further, they charged that the Saturday graduation violated a school board policy requiring neutrality towards religion and prohibiting advocation or disparagement of any religious belief.

One month later, the Circuit Court denied their request for injunctive relief and dismissed the suit on the grounds that a demonstration of compulsion by the state or one of its entities was a prerequisite to any claim of infringement of First Amendment rights. The court pointed out that attendance at the graduation ceremony was optional—completion of academic requirements was sufficient to earn one a diploma. Since the school authorities did not compel attendance at the ceremony, the court ruled that the Steins' rights had not been violated.

The girls then filed an expedited appeal to the Virginia Supreme Court, where they argued that scheduling the graduation ceremony for Saturday morning forced them to choose between their religious beliefs and participation in the graduation ceremony and thereby constituted an infringement of their First Amendment right to free exercise of religion. While it is true that participation in the ceremony was not required, they stressed the importance of a high school graduation ceremony and the unique honors that they would receive as valedictorians. They argued that the dilemma created by the school board's action amounted to compulsion and required that the school board justify its actions under the traditional and de-

manding "compelling state interest" standard enunciated by the U.S. Supreme Court. The Steins argued that the school board had failed to show the existence of such a compelling interest, or of any interest other than "administrative convenience" for their decision to schedule a Saturday graduation.

On May 28, 1980, a three judge panel of the Virginia Supreme Court heard oral arguments in the case, and the following day, in a brief memorandum containing no explanation, declined to place the case before the full court. The result of the panel's action was to affirm the Circuit Court's decision.

Following the panel's decision, the plaintiff's attorneys contemplated an appeal to the U.S. Supreme Court. However, local newspapers reported that the Steins decided to discontinue attempts to change the graduation date because they and other Jewish students had become targets of anti-Semitic slurs and had been threatened with violence. The report said their attorney planned to seek Supreme Court review of the case at a later date in an effort to prevent the scheduling of future graduations on the Jewish Sabbath.

E. Distribution of Gideon Bibles

Another continually arising issue in the area of religious practices in public schools is the constitutionality of the distribution of bibles in public schools by members of the Gideon Society. In the 1953 case of *Tudor v. Board of Education*, the New Jersey Supreme Court held that such distributions are unconstitutional. (The U.S. Supreme Court refused to hear the case thus leaving the lower court's decision intact.) This case was followed by the Florida Supreme Court in *Brown v. Orange County Board of Public Instruction* (1960).

The most recent appellate decision in the area of bible distribution is *Meltzer v. Board of Public Instruction* (1978). In that case, parents of children attending public schools in Orange County, Florida challenged the school board's resolution requiring daily morning devotional ceremonies and its policy of permitting the distribution of Gideon Bibles on school premises on the grounds that they violated the First Amendment's Establishment Clause. The Gideons had used various distribution methods, from handing out bibles in classrooms to students who indicated, by raising their hands, that they wanted one to setting up a central distribution point on the school premises, where interested students could receive free copies of the bible. (In response to the filing of the suit, the school board barred the Gideons from distributing bibles until the court's decision was handed down.) Shortly thereafter, the U.S. District Court for the Middle District of Florida held, in a three part ruling, that (a) the bible distribution program was unconstitutional (b) a school board resolution requiring daily morning devotional ceremonies, which consisted of bible readings over the public address system and the recitation of prayers was unlawful and (c) a Florida statute which required teachers to inculcate their students with "the practice of every Christian virtue" while unconstitutional on its face, could not be struck down since it had never been enforced and as such did not present an "actual controversy" over which the court had jurisdiction.

Thereafter, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, affirmed the lower court's holding that the bible distribution and morning devotional ceremony were unconstitutional. However, as to the "Christian virtue" statute the Court of Appeals split equally on the question of whether it should remain on the books despite its constitutional infirmity. The court's split had the effect of affirming the lower court's decision.

The cases discussed above have several features in common. *Kent, Ring, Stone* and *Meltzer*, taken together with the Helms Amendment, reflect the growth of Christian evangelical groups and their determination to accomplish their goals. The fact that these cases have arisen in different parts of the country indicates that their influence and potential impact, namely, the reinstitution of religious practices in public schools in violation of the Supreme Court's ban on such practices, cannot be taken lightly. In addition, the school prayer cases represent a desire on the part of many parents to find a simple solution to the moral and social problems of our nation – and their belief that religious practices in public schools are that solution.

The *Florey* and *Stein* cases highlight an issue which is an undercurrent in the cases discussed above, that is, the insensitivity of members of the prevalent religion towards those whose religious beliefs – or nonbeliefs – differ from their own. At times, the insensitivity seems accidental, as in *Florey*, where the school board was trying to devise an acceptable policy, while at other times, as in *Stein*, the insensitivity appears deliberate. This insensitivity is by no means limited to religious practices in public schools; it occurs in various settings, as illustrated by several cases discussed below.

Taken together, all of these cases reflect a growing conservative trend which does not appear to be tolerant of minority views. Such intolerance contradicts traditional American values and leaves us uneasy about the outcome of future cases.

F. Bible Literature Courses

Bible literature courses have been instituted in many schools. While a non-sectarian course in Bible literature would be constitutionally permissible, some of these courses are nothing more than thinly veiled attempts to introduce Christian religious doctrine in the public schools.

A lawsuit before the U.S. Court of Appeals for the Fifth Circuit, *Hall v. Board of Education of Conecuh County* (1980) challenged one such course as being violative of the Establishment Clause of the First Amendment.

The course entitled "Bible Literature," was approved by the Alabama State Board of Education as an optional elective which could be offered in the state's high schools. Two books were used—the bible (usually the King James version, although there was no requirement that any specific translation be used) and a state approved textbook, *The Bible for Youthful Patriots, Parts I and II.* Students who did not have a copy of the bible were given copies which had been donated to the school by a local citizen.

The course, offered in Repton High School in Conecuh County for the first time in the 1978-79 school year, was taught by a state certified teacher who had taught at the school for ten years and was also an ordained Baptist minister.

The suit, instituted by a parent whose son had enrolled in the course, alleged that the course materials and method of instruction taken together clearly constituted government support for proselytizing activity. It should be noted that the dispute was between members of different Christian sects, and did not involve the Jewish community.

The U.S. District Court for the Southern District of Alabama dismissed the case in March 1980, holding that the controversy was moot. This conclusion was based on the judge's finding that the "Bible Literature" course was not currently being taught at Repton High School, and there was no indication that it would be reinstituted.

After deciding that the case presented no justiciable controversy, the court nonetheless went on to opine that in its view it was not clear that the course violated the Establishment Clause of the First Amendment. After paying lip service to the Supreme Court's tri-partite test, the district court concluded that "the evidence that the Bible course was being conducted in a manner which advanced Christian dogma was not convincing enough as to satisfy the plaintiff's burden of proof."

Following the court's decision, the plaintiff made a post-trial motion to amend the decision. The motion contested the court's finding, and pointed out that the school board vigorously defended its practice and never claimed that the issue was moot. The plaintiff claimed that the course was not offered in the 1979-80 school year solely because of class scheduling problems, and that the school authorities had never said the course would not be offered in the future. The district court, however, denied the motion.

The U.S. Court of Appeals for the Fifth Circuit is expected to hear oral arguments in the case in the near future.

While bible literature courses are not inherently unconstitutional, the manner in which they are taught may be unconstitutional. Few cases of this nature have been litigated, and there are few, if any, judicial guidelines for school authorities to follow. Whether this case will establish such guidelines remains to be seen.

G. Bible Study Clubs

The movement to reintroduce prayer and other religious practices in the public schools is also reflected in the appearance of bible study clubs. These groups usually adhere to a Christian fundamentalist or evangelical philosophy and seek to obtain the use of school facilities, before or after regular school hours, for their meetings or other activities. They describe their activity in terms of providing students of "common" or "Christian" beliefs with an opportunity to learn more about their beliefs through "discussion, sharing and studying" or to "socialize outside of school hours and thereby draw closer to one another which hopefully will have a positive influence on the school atmosphere." While most groups are comprised entirely of students many have faculty supervisors and a few have operated with the participation of non-faculty adults.

Two courts have dealt with the question of whether bible study clubs may use public school facilities for their meetings. In *Brandon v. Board of Education of the Guilderland Central School District et al.*, a high school student group called "Students for Voluntary Prayer" requested in September 1979, that school authorities permit them to use public school property for voluntary religious activities immediately prior to the commencement of the school day. When school officials refused their request, the students brought suit in the U.S. District Court for the Northern District of New York claiming that the refusal violated the students' rights to free exercise of religion, freedom of speech and association and equal protection of the law.

The district court rejected these claims and held that the school officials were mandated, by virtue of the Establishment Clause, to prohibit the use of school facilities for the intended religious practices. The court focused on the Supreme Court's "primary effect" analysis and concluded that granting permission to the student group to use school facilities for religious purposes would unlawfully advance religion:

> "Should the plaintiffs prevail in this action, it is difficult to perceive any other result than the use of public school property for religious purposes. Not only would this constitute a contribution by the State of financial assistance to religion (provision of free rent and utilities for prayer meetings), but it would logically lead to the outward appearance of the placement of official state sanction on religious activity."

The case is presently on appeal to the U.S. Court of Appeals for the Second Circuit.

In *Chess et al. v. Widmar et al.*, the University of Missouri-Kansas City in 1977, refused to permit a student group called "Cornerstone" to use university facilities for its meetings or events. Cornerstone, an officially recognized student organization on the UMKC campus, stated that its purpose was to "promote a knowledge of Jesus Christ among students" and indicated that the subject of

the proposed meeting was to be "various topics relating to Christianity and the Bible." Typical Cornerstone meetings included the offering of prayers and evangelical activity.

In response to the University's refusals, student members of Cornerstone brought suit in the U.S. District Court for the Western District of Missouri. That court found that "a university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion." It concluded that the university's ban on religious services in its buildings was required by the Establishment Clause.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the district court's decision. The appellate court disagreed with the district court's view that granting permission to Cornerstone would have the primary effect of advancing religion. "Rather, it would have the primary effect of advancing the University's admittedly secular purpose – to develop students' 'social and cultural awareness as well as [their] intellectual curiosity.' It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular."

The court went on the state that it was not the University that would be sponsoring worship or teaching; sponsoring would lie with the recognized student groups. Moreover, "financial support would be minimal" and there would be "no active involvement of the sovereign" because the University's role would be limited to determining the time, place and manner of the event, rather than extending approval or disapproval of the content.

The court also found the instant case to be distinguishable from the situation involving a request to use classrooms for prayer or bible study by high school student groups i.e. *Brandon*. With respect to state involvement, the court stated that "high school students necessarily require more supervision than do young adults of college age and this supervision necessarily poses a greater risk of entangling governmental authority in religious issues."

Further, taking note of the character of the college or university setting as a "community," particularly in the case of the resident student who makes the university his temporary home, the court stated that university students "can expect from it a greater accommodation of their religious needs than high school students can from their schools."

II. PAROCHIAID

The problem of government aid to sectarian schools is an issue of continuing controversy as states try to devise permissible aid programs which will not be struck down by the courts as a violation of the First Amendment's Establishment Clause.

Supreme Court decisions in this area have not drawn any firm division between permissible and impermissible state aid to sectarian schools. Each ruling has been restricted to the particular statute in question, and it often appears that parochiaid cases are in one of the grayest areas of constitutional law.

In a series of decisions beginning in 1947, the U.S. Supreme Court began to lay down some basic ground rules for the permissible use of public funds to aid sectarian institutions, while at the same time striking down plans which it deemed to be in violation of the principle of separation of church and state.

This evolution began in *Everson v. Board of Education* (1947), where the Court, by a slim 5-4 majority, upheld the constitutionality of financing bus transportation for parochial school students. In establishing the "child benefit" rationale, the court declared that upon close scrutiny it was not the parochial school itself that was the beneficiary of the transportation program but rather each individual student; any resultant "indirect assistance" to religion in the form of aid to the school was inconsequential and merely a secondary by-product.

Twenty years later, the Court used the same rationale in *Board of Education v. Allen* when it upheld a law funding the purchase of secular textbooks for use by parochial school students. And in June 1977, the U.S. Supreme Court in *Wolman v. Walter* enlarged the scope of permissible state aid by taking the *Allen* rationale one step further. In a fragmented 6-3 decision, the Court held that state aid for purchasing secular textbooks, testing and scoring standardized tests, and providing diagnostic and therapeutic speech and hearing services was permissible, while state assistance for instructional materials and equipment and field trips was impermissible. The most recent development in this line of cases was the February, 1980 ruling of the U.S. Supreme Court in *Committee for Public Education and Religious Liberty (PEARL) v. Regan*.

A. *PEARL v. Regan*

In *Regan*, the Supreme Court, by a vote of 5-4, upheld a New York statute which authorized the use of public funds to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law. The statute also provided a method for auditing payments of public funds to ensure that only actual costs incurred in providing the secular services were being reimbursed.

Justice White wrote the majority opinion, in which Chief Justice Burger and Justices Stewart, Powell and Rehnquist joined. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined, while Justice Stevens filed a separate dissent.

While both the majority and the dissenters agreed that *Wolman v. Walter* was the controlling case and that the tri-partite test should be applied, they differed as to the outcome.

The majority focused on the fact that the sta-

tute dealt with tests prepared by the State and administered on the premises of nonpublic schools. They noted that these examinations dealt only with secular academic subjects, and, that while the tests were graded by employees of the nonpublic schools, they had no control over the contents. The Court held there was no substantial risk that the examinations could be used for religious educational purposes, and the State could reimburse the nonpublic schools for the time their employees spent grading the examinations. The Court also upheld the part of the statute which authorized reimbursements to nonpublic schools for performing recordkeeping and reporting services mandated by the State. The Court ruled that as such information is not part of the teaching process and cannot be used to foster any religious ideology, the State could properly reimburse the nonpublic schools for these expenses.

The majority held that the statute did not violate the three prong test. They ruled that the law had the secular purpose of providing quality education, did not advance or inhibit religion by providing reimbursement for secular State mandated expenses, and did not constitute excessive government entanglement with religion, as the statute was specific as to which expenses were reimbursable. The Court said that the fact that the statute provided for direct cash reimbursement to nonpublic schools did not alter the secular nature of the examinations and recordkeeping, and therefore did not result in excessive government involvement with religion.

While agreeing that the statute had a secular purpose, Justice Blackmun felt that it violated both other aspects of the tri-partite test. Noting that the nonpublic schools would have fulfilled the testing and reporting requirements regardless of whether reimbursement was available, he would have held that the reimbursements amounted to a direct subsidy of the operating expenses of nonpublic schools and thus advanced religion in violation of the Establishment Clause of the First Amendment. He also believed that the reimbursement would require ongoing monitoring of the nonpublic schools to ensure that only the specified expenses were being reimbursed, and felt that such a continuing scrutiny constituted excessive government entanglement with religion.

In his brief dissent, Justice Stevens agreed with Justice Blackmun's analysis, describing the majority's decision as "another in a long line of cases making largely ad hoc decisions" about what constitutes permissible State aid to nonpublic schools. He would abandon all attempts to justify such aid, in the hope of resurrecting the wall between Church and State.

An analysis of the case reveals that the Court's holding is a narrow one. Previous Supreme Court decisions have held that a state may cover the expenses of grading State-prepared standardized tests by having the work done by persons paid by the State. In *Regan*, the Supreme Court held that a state could pay a nonpublic school for grading these examinations. The Court's ruling is limited to reimbursements for state-prepared secular examinations and recordkeeping required by state law. It does not apply to tests drawn up by employees of nonpublic schools, where it could be argued that such examinations are more likely to be influenced by sectarian teachings. The major innovation of the case is that the Supreme Court has permitted direct cash reimbursements to nonpublic schools, but it is unlikely that the Court would allow such payments in situations other than the limited one at issue in *Regan*.

B. National Coalition for Public Education and Religious Liberty *(PEARL) v. Harris*

Shortly after the Supreme Court's decision in *Regan*, the U.S. District Court for the Southern District of New York upheld a federal program which allocated funds for the remedial education of parochial school students by public school teachers on the premises of the nonpublic schools during regular school hours. In *PEARL v. Harris* (1980), a three judge panel held that the program, as interpreted and applied in New York City, did not violate the Establishment Clause of the First Amendment.

The program involved is Title I, 20 U.S.C. Section 2071. It was enacted in 1965 to provide federal funding for compensatory educational programs, administered by local public educational agencies, which are directed towards educationally deprived children in low-income areas. Title I funds may be provided only to children who meet the dual eligibility requirement of (1) educational deprivation, defined as below age-level performance and (2) residence in an area designated as having a high concentration of children from low-income families. The statute specifically provides that Title I services are to be made available to children enrolled in nonpublic schools, but only if such services are not otherwise provided by the nonpublic school. The applicable Federal regulations require that the programs remain secular in both content and setting. The local public educational agency has exclusive control of funds, equipment and all Title I services provided in nonpublic schools.

Nonpublic school students who satisfy Title I eligibility standards are provided with five types of remedial services: remedial reading, reading skills instruction, remedial mathematics, English as a second language, and clinical and guidance services. The services are provided on the premises of the nonpublic schools by teachers and support staff who are employed by the New York City Board of Education and are under its supervision and control. After studying the alternatives, the Board of Education decided to schedule the classes during the regular school day. In 1976, PEARL instituted this suit, challenging the use of federal funds to pay teachers assigned to sectarian schools to provide Title I services during the regular school day. In April, 1980, the district court

upheld the program, stating that its decision dealt solely with the program as implemented in New York City.

In its decision, the court noted that the religious schools had no control over the remedial program. Title I services were provided in classrooms specifically set aside for the program, funds were not paid to the nonpublic schools, and there was little contact between the teachers providing the services and employees of the nonpublic schools. The court stated

> The Title I teachers' responsibilities are clearly defined, and the nonpublic school officials understand that they have no control or authority over the program. The record demonstrates that the program's design and implementation have successfully avoided any confrontation between government officials and parochial school administrators.

The court held that the program as instituted in New York City did not violate the Establishment Clause of the First Amendment. The program had the secular purpose of giving remedial help to deserving school children; its primary effect neither advanced or inhibited religion, as Title I funds are not paid to the nonpublic schools; and the program had been carefully structured so as to avoid any excessive government entanglement with religion.

According to PEARL's attorney, PEARL plans to seek review of the decision. These two cases indicate that the controversy over the boundaries of permissible state aid to private schools is far from over. While recent holdings on permissible aid appear to be far broader than the Supreme Court's decisions in some of the original parochiaid cases, the Court continues to strike down plans which would, constitute direct operating subsidies to the schools. It is nearly impossible to determine at exactly what point the Supreme Court would hold that a parochiaid statute was a direct subsidy; this distinction, is a wavering line which often appears to vary from situation to situation depending on the facts of the particular case.

C. "Tax Credit" Legislation

Another method of assisting parents whose children attend nonpublic schools is by granting the parents an income tax credit for school related expenses. Two recent cases dealt with statutes that permitted parents to deduct part of these expenses from their state income tax. One statute was upheld; the other was struck down.

1. *Minnesota Civil Liberties Union v. Roemer*

The statute upheld in *Minnesota Civil Liberties Union v. Roemer* (1978) was a Minnesota law which permitted parents of students attending public and private schools to claim up to $700 per year of the expenses as a deduction on their state income tax return. According to the statute, deductible expenses included costs related to tuition, transportation and textbooks. Expenses for books and materials used for teaching religious doctrine were not deductible.

The U.S. District Court for the District of Minnesota, by a 2-1 vote, held that the statute did not violate the Establishment Clause of the First Amendment. The Court focused on whether the statute had a primary purpose which either advanced or inhibited religion. (The Civil Liberties Union suit did not allege that the statute's purpose was not secular or that it involved excessive government entanglement with religion.) The court held that the statute was valid because it equally benefitted parents of children in both public and nonpublic schools, and that the deduction was available only for specific nonreligious expenses. The court noted that the statute, which was enacted in 1955, had been unchallenged until suit was brought.

Following the decision of the Court of Appeals for the Third Circuit in *Public Funds for Public Schools of New Jersey v. Byrne*, below, the Minnesota Civil Liberties Union has announced that it will once again challenge the statute claiming that the overwhelming majority of parents who benefit from the deduction send their children to religious schools, and the statute therefore violates the Establishment Clause.

2. *Public Funds for Public Schools of New Jersey v. Byrne*

New Jersey enacted a provision of its state income tax law which permitted a taxpayer whose dependent children attended a nonpublic school to deduct $1000 per child from his gross income in computing his state taxes. In *Public Funds for Public Schools of New Jersey v. Byrne* (1979), the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit both held that the provision violated the Establishment Clause. The Supreme Court summarily affirmed the decisions of the lower courts.

The Court of Appeals held that the statute had the primary effect of advancing religion, since 95% of New Jersey's private schools were religion oriented. The court held that while the statute had a secular purpose and did not involve excessive government involvement with religion, it had the direct effect of aiding religion and thus was unconstitutional.

This case can be distinguished from *Roemer*, above, on two grounds. *Roemer* applied equally to parents of children in both public and nonpublic schools, while the New Jersey law applied only to parents of students enrolled in nonpublic schools. Also, the statute in *Roemer* specified which expenses could be used to obtain the deduction, while the New Jersey statute was an outright deduction, regardless of actual expenses. Whether these distinctions are sufficient to once again uphold the Minnesota statute will be decided by the Civil Liberties Union's pending lawsuit.

There have also been attempts to enact federal tax credit legislation, but most of these bills have died in Congressional committees. The interest in tax-credit legislation can be traced to many causes: the growth of evangelical and conservative groups; the feeling of many parents that public

schools are not educating their children properly; and increasing tuition costs, which, when coupled with our rapidly rising inflation, create financial hardships for many families who, for various reasons, have chosen to send their children to private schools.

III. RELIGIOUS DISCRIMINATION

A. Civil Rights Act of 1964 – Section 701(j)

A 1972 amendment to the Civil Rights Act of 1964 known as Section 701(j) requires an employer to "reasonably accommodate" an employee's or prospective employee's religious observance so long as there is no "undue hardship" on the conduct of the employer's business. In the 1977 case of *Hardison v. TWA*, the U.S. Supreme Court interpreted the statute to mean that an employer had to accommodate Sabbath observers unless the employer could demonstrate that to do so he would have to incur anything more than "de minimus" (minimal) costs. However, the Court did not rule on the constitutionality of Section 701(j). That challenge has recently occurred in at least three separate cases.

1. *Yott v. North American Rockwell Corporation*

Yott, a member of "The Church Which Is Christ's Body," had worked for Rockwell since 1947. In 1968, Rockwell and the International United Automobile, Aircraft and Agricultural Implement Workers of America, Local Union 887, reached a collective bargaining agreement which required that all workers join the union. Yott refused to join the union, as his religion forbade Christians from being members of or paying dues to a labor union. Yott also rejected a proposal that he contribute an amount of money equal to union dues to any charity, including his own church, on the grounds that his religion required that contributions to charitable organizations be made voluntarily. (The fact that Yott was sincere in his beliefs was undisputed.)

Yott, in turn, proposed three alternative solutions, all of which were rejected by both the company and the union as unreasonable. When Yott was fired for failing to join the union, he sued both the company and the union, claiming that he had been wrongfully fired due to his religious beliefs.

The U.S. District Court for the Central District of California ruled against Yott. In doing so it noted that the company and union had met the statutory requirement that they make a good faith effort to accommodate Yott's religious beliefs and that such efforts had been unsuccessful. However, the court did not stop there. It went on to state that in its view Rockwell had no obligation whatsoever to accommodate the religious beliefs of its employees. Addressing itself to Section 701(j), the court found the statute to be unconstitutional because it lacked "neutrality" with respect to religion, and therefore violated the Establishment Clause of the First Amendment.

In August 1979, the U.S. Court of Appeals for the Ninth Circuit dismissed Yott's claim without reaching the constitutional issue. The appellate court avoided it by holding that the district court had been correct in concluding that Yott's religious beliefs could not be reasonably accommodated without "undue hardship." The case was subsequently appealed to the U.S. Supreme Court, which refused to review the decision.

2. *Gavin v. Peoples Natural Gas Company*

In *Gavin v. Peoples Natural Gas Company*, a Jehovah's Witness was dismissed from his job when he refused, on religious grounds, a job assignment to raise and lower the company's American flag. (As in *Yott*, the sincerity of Gavin's religious beliefs was not disputed.)

The district court in Pennsylvania granted summary judgment for the company. In so doing, the court voiced serious doubts about the statute's constitutionality, and held that it could not be constitutionally applied in this or any other similar case because that would necessarily lead to an entanglement of the court with religious beliefs, requiring the court to abandon what it perceived to be a constitutionally-mandated "hands off" attitude toward religion.

On January 16, 1980, a three-judge panel of the U.S. Court of Appeals for the Third Circuit reversed the district court decision in *Gavin*. However, the court of appeals held only that the district court erred in granting summary judgment in favor of the challenge to Section 701(j) because a genuine issue of material fact existed as to whether the employer had attempted to make a reasonable accommodation of Gavin's religious beliefs. The case was, therefore, returned to the district court for further hearings on the factual issue.

3. *Anderson v. General Dynamics Convair Aerospace Division*

The issue of the constitutionality of Section 701(j) is currently before the U.S. Court of Appeals for the Ninth Circuit in *Anderson v. General Dynamics Convair Aerospace Division*.

Anderson bears a striking resemblance to *Yott*, above, which was also decided by the Court of Appeals for the Ninth Circuit. Anderson began working for General Dynamics in 1956, and became a member of the Seventh Day Adventist Church in 1959. In 1972, the company and the International Association of Machinists and Aerospace Workers reached an agreement which contained a provision requiring all employees to join the union. Anderson refused to join the union on religious grounds, and was fired.

Anderson sued both the company and the union in U.S. District Court for the Southern District of California, claiming that his discharge was due to his religious beliefs. That court held that his religious beliefs could not be reasonably accommodated due to the nature of the case. Anderson appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, which reversed the lower

court's ruling. It held that a reasonable accommodation could be made by having Anderson pay, to a charity of his choice, an amount of money equivalent to the applicable union dues. The Court of Appeals remanded the case to the district court to determine the amount of attorneys fees which Anderson, as a successful plaintiff, was eligible to receive.

On remand, however, the company and union pursued their claim that Section 701(j) was unconstitutional in that it violated the Establishment Clause of the First Amendment. After noting that no previous appellate court had decided this issue, the U.S. District Court for the Southern District of California, in May 1980, held that Section 701(j) was unconstitutional.

In applying the tri-partite test, the court found that Section 701(j) violated all three prongs. It stated that an analysis of the legislative history revealed the statute lacked a secular purpose, and had a primary effect which served to advance religion. The court also held that as claims raised under Section 701(j) would require the courts to decide "the sincerity of the religious beliefs involved and the validity of the religious claim," the statute resulted in excessive government entanglement with religion. In the court's words:

> "In essence, the accommodation provision mandates religious discrimination. It requires an overt preference for the religious beliefs of certain employees and dictates that an employer must go out of his way to accommodate minority religious beliefs, even if such accommodation is detrimental to other employees."

In so holding, the court granted the company and union's motion for summary judgment and declared Section 701(j) to be unconstitutional.

Anderson had appealed this decision to the U.S. Court of Appeals for the Ninth Circuit, which will hear oral arguments in the case in the Fall of 1980.

It appears likely that the issue of whether or not Section 701(j) violates the Establishment Clause will ultimately have to be decided by the U.S. Supreme Court. It should be noted that the Court declined to hear an appeal of the *Yott* decision, which focused on whether Yott's beliefs could be reasonably accommodated and not on the constitutional issue. In *Hardison*, the Supreme Court did not rule on the constitutionality of Section 701(j). Whether it will do so if and when *Anderson* reaches its docket remains to be seen. It is clear, however, that if the Supreme Court were to hold the statute unconstitutional, it would be a devastating blow not only to all those who observe a Saturday Sabbath, but to the cause of religious liberty in America.

B. Reasonable Accommodation

While the previous cases have focused on the constitutionality of 701(j), others have focused on the issue of when an employer could invoke the "undue hardship" standard for failing to accommodate an employee's religious beliefs.

1. *Kentucky Commission on Human Rights v. Department for Human Resources*

In *Kentucky Commission on Human Rights v. Department for Human Resources* (1978), the Kentucky Court of Appeals held that the "undue hardship" test was applicable only after an employer had made a reasonable effort to accommodate an employee's religious beliefs.

The case involved a nurse, Linda Sue Bailey, who belonged to the Worldwide Church of God. Church members refrain from working from sundown Friday until sundown Saturday and on certain religious holidays. Ms. Bailey accepted a position as a Nurse's Aide Trainee at Hazelwood Hospital, and informed the nursing supervisor of her religious beliefs. Ms. Bailey offered to work on any other days, including Sundays, but was told by the nursing supervisor that no accommodation could be made for her religious observance. Ms. Bailey was recorded in the hospital files as having declined the position for refusing to work scheduled hours.

Ms. Bailey complained to the Department of Human Resources, which determined that the hospital was correct in concluding that no accommodation could be made because it would be unfair to other non-observant employees. The Kentucky Commission on Human Rights, however, disagreed and held that the hospital had discriminated against Ms. Bailey because it had made no effort to accommodate her religious beliefs.

In a suit brought to resolve this conflict between two state administrative agencies, the Commission's ruling was reversed by the Franklin Circuit Court, relying on *Hardison v. TWA*. The court held that undue hardship, in the form of "chaotic personnel problems," would result if the hospital was obligated to accommodate Ms. Bailey's religious beliefs.

The Kentucky Court of Appeals, however, reversed the Circuit Court's holding, saying that the *Hardison* "undue hardship" standard had not been met in this case, as the hospital had made no attempt whatsoever to accommodate Ms. Bailey's religious beliefs. According to the Court of Appeals, at a minimum, *Hardison* requires an employer to make a reasonable effort to accommodate an employee's religious beliefs. Only when that effort fails or is shown to involve more than de minimus costs, has the employer acted lawfully.

2. *State Division of Human Rights v. Genesee Hospital*

In an unpublished decision, the New York Court of Appeals held that the burden is on the employer to make all efforts to reasonably accommodate an employee's religious beliefs; he cannot leave it to the employee to make the necessary arrangements.

In holding that a hospital had discriminated against a Jewish sabbath observer, the Court of Appeals adopted the dissenting opinion issued in a lower court. The decision in *State Division of*

Human Rights v. Genesee Hospital (1979), followed administrative hearings by the New York Commissioner of Human Rights, who had held that the hospital's actions constituted discrimination.

In September 1975, Sally Rappaport was hired by Genesee Hospital as a technician-trainee in the Nuclear Medicine Division of the Radiology Department. Her regular schedule was a five-day work week, with occasional Saturday work involving emergency procedures. Ms. Rappaport accepted this schedule, believing that occasional work in emergency situations was not a violation of her religious principles.

However, in January 1976, she and the other three staff members of the Nuclear Medicine Division were informed that they would have to work every other Saturday, doing non-emergency procedures, to increase hospital revenues. Ms. Rappaport asked the hospital to make an accommodation in her work schedule to permit her to observe the Sabbath, but the hospital refused to do so. The Commissioner of Human Rights held that the hospital did not attempt to make a reasonable accommodation of her religious beliefs. However, by a 3-1 vote, the Appellate Division, Fourth Department, reversed the Commissioner's ruling.

The majority rejected the commissioner's holding that the hospital had to accommodate Ms. Rappaport's religious observance, saying that to require such an accommodation would "exalt the religious preference of the Sabbath observer over the economic interest of the employer and the religious or work preference of co-employees."

This decision was appealed to the New York Court of Appeals, which adopted the dissenting opinion in the lower court and thus reversed the majority's holding.

The opinion adopted by the Court of Appeals focused on two issues, namely, whether there was an affirmative duty on the hospital to attempt to accommodate Ms. Rappaport's observances and whether the hospital had proved that because of "undue economic hardship" it did not have to make such an accommodation.

It held that the hospital was obligated to try to accommodate the complainant's religious beliefs, but had failed to do so. It noted that Ms. Rappaport's supervisors did not ask her co-employees if they would be willing to switch schedules with her, leaving it to Ms. Rappaport to make the request. The hospital did not suggest other positions which did not require Saturday work, although there were several available. "By this attitude of indifference, petitioner (the hospital) placed the responsibility for avoiding discrimination upon the complainant (Ms. Rappaport), rather than accepting the duty imposed upon it by law." The opinion also upheld the Commissioner's finding that the hospital had not shown that accommodating Ms. Rappaport's beliefs would constitute "undue hardship."

The opinion modified the Comissioner's ruling, which required the hospital to reemploy Ms. Rappaport in the Nuclear Medicine Division, holding instead that it would be sufficient for the hospital to offer her a job with comparable pay and terms of employment.

While the "undue hardship" test is still valid, these cases indicate that the courts will not automatically accept it as a defense to a claim of religious discrimination. The courts have placed the burden of attempting to accommodate an employee's religious beliefs on the employer, and will consider the existence of "undue hardship" only when the employer has, in fact, first tried to accommodate the employee's religious practices.

C. Denial of Employment

The decision of the U.S. Court of Appeals for the Sixth Circuit in *Kantor v. Dunn* (1978) permitted the State of Tennessee to effectively deny a Jewish Sabbath observer the opportunity for state employment because of her religious beliefs.

Glenda Kantor was unable to take a mandatory state civil service examination because it was given in her hometown of Memphis only on Saturday. The State refused her request to take the examination in Nashville on any other weekday. A trip to Nashville, approximately 200 miles away, would involve either driving 3½ hours each way or a costly plane ride, and would make taking the examination a matter of substantial difficulty and expense.

The state authorities conceded that the cost of administering the test to Mrs. Kantor in Memphis on a day other than Saturday would be $15.00 plus mailing – the $15.00 would cover the cost of a monitor who would administer the test. The State further admitted that it maintained a staff of monitors in Memphis for the purpose of giving tests, and that clerical (typing and shorthand) tests were given in Memphis on days other than Saturday. The State's refusal to accommodate Mrs. Kantor was based on its claim that "if they do this for Mrs. Kantor, they will be requested and ultimately required to do it for other persons, all over the state, who would rather not come to Nashville for the test and who, for one reason or another, do not want to take the test on Saturday."

The U.S. District Court for the Western District of Tennessee stated that its analysis of prior Supreme Court cases required it to balance the interest of the state in enforcing its policy against the weight of the burden placed on Mrs. Kantor's free exercise of her religion. The court concluded that the burden placed on Mrs. Kantor was "minimal" and that the state had shown a "substantial administrative and financial reason" for its policy.

On appeal, the Court of Appeals merely adopted the trial court's conclusions, holding that "these findings are not clearly erroneous." The court neither analyzed nor cited authority in support of the legal standard employed by the trial court for determining whether Tennessee had in fact burdened Mrs. Kantor's right to practice her religion. The dissent saw the issue more clearly and argued that Tennessee's refusal to give the test in Memphis on a day other than Saturday "constitutes an infringement on appellant's rights under

the First Amendment, however minimal it may be ..." and is not justified by any "legitimate reason, much less the kind of 'compelling reason' required by the First Amendment."

The U.S. Supreme Court refused to hear the case.

While there may be no constitutional right to state employment, the reasoning used by the state and accepted by the courts reflects a lack of tolerance and flexibility. The case reflects the insensitivity of the majority towards those with differing religious beliefs, as discussed in the section dealing with Religious Practices in the Public Schools.

D. Unemployment Compensation

In another area of religious discrimination, the U.S. Supreme Court will decide whether a provision of Indiana's unemployment compensation law, as applied, violated a claimant's First Amendment right to free exercise of religion. The statute in question provides that an individual "who has voluntarily left his employment without good cause in connection with work is disqualified from receiving benefits."

The case, *Thomas v. Review Board of the Indiana Employment Security Division*, is reminiscent of the 1963 Supreme Court decision in *Sherbert v. Verner*. *Sherbert* involved a member of the Seventh Day Adventist Church who was discharged by her employer when she refused, for religious reasons, to work on Saturday. Her claim for unemployment compensation was rejected by the South Carolina Employment Security Commission, which held that her unavailability for Saturday work placed Ms. Sherbert within the provision which disqualified workers "who fail, without good cause, to accept suitable work when offered."

The state courts had upheld the commission's decision, but the U.S. Supreme Court reversed, holding that the Commission's ruling violated the Free Exercise Clause of the First Amendment, saying:

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

The *Thomas* case involves a Jehovah's Witness who quit his job at a plant that manufactured weapons after alleging that his religious beliefs did not permit him, in good conscience, to continue working at the plant.

Thomas, without seeking any information about the company, had applied for employment in a plant engaged primarily in the production of weapons. On his employment application, he did not state any restrictions or conditions regarding his work. He was hired directly into the roll foundry, and had worked there for nearly a year when the foundry closed. At that time, he was transferred to the turret line, where he realized the nature of the plant's products.

Thomas asked other members of his congregation about the propriety of working in an armaments factory. While they may have agreed to decide for him whether or not he should continue working at the plant, the record in the lower courts did not reflect if such a decision was ever made. Thomas did not seek a transfer because he said there were no other departments for him to work in. He asked for a lay-off, which was denied, and then quit, stating that continuing to work with weapons was against his religious principles.

Thomas' application for unemployment compensation, which stated that he voluntarily qui work because of religious convictions, was denied on the grounds that he had left the job without good cause in connection with his work. Thomas unsuccessfully appealed the denial of compensation in administrative channels before he filed suit on the grounds that the statute, as applied to him, violated his right to free exercise of his religion under the First Amendment.

In July 1979, the Indiana Supreme Court by a vote of 3-2, held that the statute's "without good cause" requirement did not violate Thomas' First Amendment rights. The court found *Sherbert* to be distinguishable from the situation in *Thomas*. The court's review of the record revealed that the basis of Thomas' belief was unclear. The precise belief was not articulated, nor did it show how the exercise of his religious belief was hampered. There was no evidence that there was any pressure on Thomas, or on a fellow Jehovah's Witness, who continued to work at the plant, to quit. Thus, the expression of Thomas' personal dilemma "does not equal a violation of the kind of cardinal religious tenet at stake in *Sherbert*..." Further, the court distinguished between the claims of persons who "refuse to perform positive action established by the state" and those from whom benefits have been withheld. "Thomas is not required by statute to violate a cardinal tenent of his religion... He is not prevented from seeking, being available for, or accepting new work." Thus, to rule in Thomas' favor "would be an improper expansion of [*Sherbert*]."

Finally, the court asserted that to award benefits to Thomas would violate the First Amendment's Establishment Clause, concluding that,

> "To hold that an employee who voluntarily quits work for personal reasons and personal benefits which can somehow be described as religious, must be allowed benefits while other employees who voluntarily quit work for valid personal reasons or beliefs which are not 'religious' are denied benefits, would violate the Establishment Clause of the First Amendment.

There were also two dissenting opinions. Both dissents took the position that *Sherbert v. Verner*, was controlling and required that Thomas be awarded unemployment compensation. The essence of *Sherbert*, they argued, is that the state may not force the claimant to choose between following the precepts of his religion and forfeiting benefits and abandoning those precepts in order to

accept work. The dissents emphasize that Thomas as a working person who was covered by the Indiana unemployment compensation law, is not a nonproductive member of society. Thomas, like Ms. Sherbert,

> "remained ready, willing and available to work at a multitude of jobs ... Thomas was available to work at jobs which did not involve the production of armaments ... [He was] only temporarily in need of unemployment compensation and therefore clearly [came] under the Constitution's protective umbrella."

In addition, one dissent took issue with the majority's skepticism toward the religious basis of Thomas' claim and the centrality of the particular belief in Thomas' religious framework. Finally, with respect to the establishment of religion issue, the dissent asserted that a decision in favor of Thomas "in no way fosters the establishment of the Jehovah's Witnesses religion" but merely reflects "the governmental obligation of neutrality in the face of religious differences."

In February, 1980, the U.S. Supreme Court announced that it would review the case. Oral arguments before the Court will be held in the Fall of 1980.

The differing views of *Sherbert v. Verner* adopted by the majority and dissenting opinions in *Thomas* dramatically illustrate the issue that now confronts the U.S. Supreme Court. The Court may have to decide whether *Sherbert* provides First Amendment protection in a wide variety of situations where claimants are faced with a choice of following their religious beliefs and foregoing a state-created benefit or abandoning the belief in order to obtain the benefit or whether *Sherbert* provides only limited protection where the state directly burdens a cardinal tenet of one's religion.

IV. DISPLAY OF RELIGIOUS SYMBOLS ON PUBLIC PROPERTY

Each year at Christmas and Easter there are numerous complaints about religious displays (i.e., creches and crosses) on public property. Few of these disputes are ever litigated; for the most part they are settled out of court. However, there have been two recent cases in this area.

1. *Fox v. City of Los Angeles*

In *Fox v. City of Los Angeles* (1978), the California Supreme Court issued an injunction prohibiting the display of a large illuminated cross on Los Angeles' City Hall. The trial court had issued a preliminary injunction against the display, but had been reversed by an intermediate appellate court. The cross, formed by arranging lights and window blinds within the building, was displayed four times a year, on the Christmas and Easter Sundays of both the Latin and Eastern Orthodox faiths.

In granting the injunction, the majority focused on the California Constitution, which states that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." It held that while the City Council resolution authorizing the lit cross "is predicated upon its being a symbol of the spirit of peace and good fellowship toward all mankind...other evidence... makes it clear that the real purpose is a religious one."

The court held that the display constituted government preference of a religious practice. It noted that the display of the cross on the Eastern Orthodox holidays resulted from a request by a member of that community that "the same considerations be extended to members of Eastern Orthodoxy." The court concluded that the display therefore involved preferential treatment of certain Christian groups, and said, "To illuminate only the Latin cross...does seem preferential..."

The majority stated while the cross had been displayed for 30 years without objection, there was "no permissible evidence of disinterest" on the part of those who may have found it objectionable, but for various reasons may not have formally complained. The court also said that while the display was not by itself a religious service, it violated the "position of neutrality" which the government is obligated to assume.

In her concurring opinion, Chief Justice Bird stated that the display violated both the California Constitution and the First Amendment to the U.S. Constitution. She agreed with the majority in that the display constituted preferential treatment of a religion, saying, "the cross was lit on the face of the city building which indicated government's sponsorship of the display in the clearest of terms." She also noted that while city officials approved the display "at their own initiative," they had not taken similar steps to display symbols of other religions.

Chief Justice Bird argued that the display violated the Establishment Clause of the First Amendment. In her view, the display was sectarian, and not secular, as the cross did not represent "the spirit of peace" to members of other religions. While acknowledging that some people attributed a secular meaning to Christmas, she described the display of the cross on Easter Sunday, "a holy day having no independent secular significance," as having the primary effect of advancing religion. She also felt that since other religious groups might request the display of their religious symbols, there might be an excessive government entanglement with religion, as the City Council would have to approve all such displays and thus might have to decide which practices and symbols were religious and which were not.

In an interesting dissenting opinion Judge Richardson noted that as there was "no evidence that the city had ever denied *any* similar request to *anyone*" during the 30 years the practice had existed, the display did not by itself constitute preferential treatment of a religion in violation of the California Constitution. He felt that the display did not violate the Establishment Clause of the First Amendment, as it had a secular purpose of promoting "a general spirit of peace, warmth,

good fellowship and good will," as well as providing "an attractive decoration for the city hall tower." He said that there was no evidence that the display either encouraged or inhibited religion, describing the response to the 30-year old practice as "thundering silence." Judge Richardson felt that there was no excessive government entanglement with religion, as the cross was displayed only four nights a year at an annual cost of $103. He added that the concurring opinion's concern with display requests by other groups was misplaced, as "that issue has not arisen in 30 years and is not before us now," and concluded that the complainant had "alleged no significant interference with her constitutional rights."

In his brief dissent, Judge Clark criticized the majority opinion in that the court did not explain its holding in the case, but instead used terms such as "preference" without defining them. He also felt that the majority had failed to provide guidelines for the lower courts to follow.

2. *Citizens Concerned for Separation of Church and State v. City and County of Denver*

In *Citizens Concerned for Separation of Church and State v. City and County of Denver,* the U.S. District Court for the District of Colorado, in December, 1979, ordered the removal of a Nativity Scene from a Christmas display on the front steps of the Denver City and County Building. The creche consisted of life-sized figurines of Mary, Joseph, the infant Jesus, shepherds, wise men and animals, and depicted the birth of Christ as described in the writings of St. Matthew, St. John and St. Luke. (The suit did not challenge the rest of the display, which included figures of Santa Claus, his sleigh and reindeer, and elves' toy shop.)

The figurines used in the Nativity Scene were purchased with public funds and the display was arranged and set up by an employee of Denver's Parks and Recreation Department. In 1978 and 1979, the Mayor and the City Council rejected requests that the Nativity Scene be removed from the Christmas display. Following the 1979 refusal to remove the creche, this lawsuit was filed.

The suit charged that the Nativity Scene is a religious symbol, and that its inclusion in the display violated the Establishment Clause of the First Amendment. The district court agreed, and ordered its removal.

The court rejected the city's argument that the creche had a secular purpose of drawing people into the downtown Denver business district, saying "This contention...fails to explain the importance of the creche itself to such a commercial purpose." The court further held that the Nativity Scene had the primary effect of advancing religion, noting that there had been a great deal of public support for the creche's inclusion by local citizens who interpreted the scene "as a religious symbol and an affirmation of their sincere religious beliefs." Responding to the testimony of a psychologist and other witnesses, the court stated that "the Nativity Scene may well have the effect also of inhibiting religious beliefs (non-beliefs) of viewers." Various witnesses had testified that certain Christian sects, as well as atheists and non-Christians, were offended by such displays.

The court also ruled that the Nativity Scene constituted excessive government entanglement with religion, as the city had taken the sole responsibility for purchasing, erecting and displaying the creche. It also noted that the controversy had creatd a division within the community which was likely to continue if the creche was permitted to remain.

Following the district court's ruling, the Court of Appeals for the Tenth Circuit granted the city's request for a stay of the order pending an appeal. The Nativity Scene, and the rest of the display, remained at the building until mid-January, 1980. In January, the U.S. Supreme Court declined to rule on the merits of the case, and sent the case back to the Court of Appeals for the Tenth Circuit, which heard oral arguments in July, 1980.

On September 4, 1980, the Court of Appeals, in a unanimous opinion, held that the lawsuit must be dismissed on the technical ground that the plaintiff group, the Citizens Concerned for Separation of Church and State, failed to "establish on the record that any constitutionally protected interest of it or its members has been abridged by the challenged display of the Nativity Scene." According to the court, the evidence at trial did not establish that any of the witnesses were members of the plaintiff association or that they were taxpayers of the City and County of Denver and the State of Colorado. Consequently, the case has been remanded to the district court where the plaintiff will have the opportunity to supplement the record in order to make the issue ripe for decision.

Conclusion

The preceding review of recent cases reveals a disturbing trend. The Establishment Clause, once thought of as creating a "high wall of separation between church and state," has been breached with increasing frequency. In the public schools, pro-prayer forces have been successful in obtaining a minute of silence for "meditation" (*Gaines v. Anderson*), the posting of the Ten Commandments in classrooms (*Stone v. Graham*), observance of religious holidays (*Florey v. Sioux Fall School District*), teaching religion in the guise of bible as literature courses (*Hall v. Bd. of Education*) and the use of State University facilities for bible study groups (*Chess v. Widmar*). While a blatant attempt to introduce prayer in the public schools in the form of a "voluntary" program was declared unconstitutional in Massachusetts (*Kent v. Commissioner of Education*), it seems certain that this battle will continue over similar attempts in other states. At the federal level, there is great concern over the Helms Amendment, which would eliminate federal court jurisdiction over constitutional challenges to "voluntary" prayer in the public schools.

In the area of parochiaid, the U.S. Supreme Court has, for the first time, upheld the direct use

of public funds to reimburse sectarian schools for performing various testing and reporting services mandated by state law (*PEARL v. Regan*). Shortly thereafter, a lower federal court upheld a federal program which allocated funds for the remedial education of parochial school students by public school teachers on the premises of the nonpublic schools during regular school hours (*PEARL v. Harris*). In Minnesota, a federal court upheld a state statute which permitted parents attending private as well as public schools to claim a certain deduction on their state income tax returns (*MCLU v. Roemer*). The results in these cases are clearly inconsistent with the principle of maintaining strict separation between church and state.

In reaching these results, the courts have not announced any new legal doctrines. They purport to follow the Supreme Court's tri-partite test. However, it seems clear that the test has been recently applied so as to undermine the separation principle that it was designed to protect. That the courts have opted for this result appears to reflect the strength of several factors including an increasing conservative attitude by the public at large, the growth of the Christian evangelical movement and the willingness of judges to accommodate perceived community desires even though a fundamental principle may be eroded in the process.

Recent judicial developments involving the rights of persons who are members of minority faiths are also cause for concern. The 1972 amendment to the Civil Rights Act of 1964, Section 701(j), which requires an employer to "reasonably accommodate" an employee's or prospective employee's religious observance so long as there is no "undue hardship" on the employer's business has come under widespread constitutional attack. At least three U.S. district courts have ruled that the statute is unconstitutional on the basis of the Establishment Clause (*Yott v. North American Rockwell Corp., Gavin v. Peoples Natural Gas Co.* and *Anderson v. General Dynamics*), and the issue seems destined to be decided by the U.S. Supreme Court.

Not only have recent rulings involving the Establishment Clause been detrimental to persons of minority religions, but in some instances, they have also found the courts to be insensitive to their claim for protection under the Free Exercise Clause (*Stein v. Fairfax County School Board* and *Xantor v. Dunn*). In each of these cases state governmental action clearly burdened the rights of Saturday sabbatarians – in *Stein* the action appeared to be deliberate – yet the courts refused to afford the plaintiffs the protection of the First Amendment. The governmental action in these cases highlight an aspect which is an undercurrent in the previous cases, the insensitivity of the majority towards those whose religious beliefs – or nonbeliefs – differ from their own. Whether this insensitivity is deliberate or accidental, it contradicts traditional American values which honor toleration and respect for persons of minority faiths. That the courts failed to protect the rights of the plaintiffs in these cases leaves us uneasy about the outcome of future cases.